

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KAMILA PASINA, as Special Administrator )  
for the Estate of FATU TAPUTU, Real Party )  
in Interest, CHRISTOPHER RAMIREZ, )

2:08-cv-1199-RCJ-RJJ

*Plaintiffs,*

v.

**ORDER**

CALIFORNIA CASUALTY INDEMNITY )  
EXCHANGE; DOES I through V; and ROE )  
CORPORATIONS VI through X, inclusive, )

*Defendants.*

**INTRODUCTION.**

Before the Court is Plaintiffs' Motion for Remand pursuant to 28 U.S.C. § 1446 (#6); Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (#9); and Plaintiffs' Countermotion for Rule 11 Sanctions pursuant to Federal Rule of Civil Procedure 11 (#11). The Court has considered Plaintiff's Motion and the pleadings on file on behalf of all the parties. IT IS HEREBY ORDERED that Plaintiffs' Motion for Remand is *denied* (#6); Defendant's Motion to Dismiss is *denied in party* and *granted in party without prejudice* (#9), and Plaintiffs' Countermotion for Rule 11 Sanctions is *denied* (#11).

**BACKGROUND.**

Plaintiffs Christopher Ramirez and Kamila Pasina as the Special Administrator of the Estate of Fatu Taputu brought a claim against Defendant California Casualty Indemnity Exchange for breach of contract, insurance bad faith, and other theories of recovery for the manner in which Defendant handled a claim for personal injuries stemming from an automobile accident which occurred on June 21, 2004. Tricia Maldonado, who had a personal liability policy with Defendant insurance company, gave Plaintiff Christopher Ramirez permission to drive her car. While driving her car, he struck Fatu Tatupu as he was walking on the side of the road. Tatupu suffered fatal injuries and his heirs submitted a claim under the liability portions of Defendant's policy for the vehicle.

Pasina, on behalf of Tatupu's estate, submitted a claim with the Defendant and also filed against Ramirez for negligence, and against Tricia Maldonado for negligent entrustment. The case against Ramirez was resolved in a stipulated judgment for \$1.2 million, not involving Defendant. The case against Maldonado was resolved by a jury trial in which the jury found in favor of Maldonado. Ramirez pled guilty when criminal charges were brought against him for driving under the influence and or being under control of a vehicle resulting in substantial bodily harm. He is currently serving time in a Nevada correctional facility.

Plaintiffs brought a complaint against Defendant on June 24, 2008 and Defendant filed for removal on September 11, 2008. Plaintiffs seek a private right of action against Defendant. Their suit alleges breach of contract, breach of implied covenant of good faith and fair dealing, or breach of fiduciary duty. Defendant contests their standing to bring the suit and argues that the lack of contractual duty between the Plaintiffs and Defendant results in a lack of standing to sue on these claims.



1 acting for Defendant in this matter. Plaintiffs contend that “whether counsel was authorized to accept  
2 service or not is irrelevant” because he was representing Defendant in this matter and therefore was  
3 the only ethically responsible person to service. Defendant’s Counsel denies receiving the fax and  
4 makes it clear that he is not a designated representative of the insurance company and is not  
5 authorized to receive pleadings. As indicated in Plaintiffs’ Motion and Reply brief, they have chosen  
6 to completely disregard N.R.S. § 680A.250 which mandates service on the commissioner by merit  
7 of Defendant’s foreign (California) insurance company status. Accordingly, Plaintiffs’ Motion to  
8 Remand is *denied*.

9 **B. Defendant’s Motion to Dismiss Pursuant to Federal Rule of Civil Procedure**  
10 **12(b)(6).**

11 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal is appropriate if  
12 the plaintiff “fail[s] to state a claim upon which relief can be granted.” Dismissal for failure to state  
13 a claim under Rule 12(b)(6) is proper only if it is beyond doubt that the plaintiff can prove no set of  
14 facts in support of the claim that would entitle the plaintiff to relief. *Williamson v. Gen. Dynamics*  
15 *Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000). The review is limited to the complaint, and all  
16 allegations of material fact are taken as true and viewed in the light most favorable to the plaintiff.  
17 *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996). Although courts assume the factual  
18 allegations to be true, courts should not “assume the truth of legal conclusions merely because they  
19 are cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.  
20 1981).

21 On a motion to dismiss, the court “presumes that general allegations embrace those specific  
22 facts that are necessary to support the claim.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889  
23 (1990). The Ninth Circuit holds that a motion to dismiss for failure to state claims under Rule  
24 12(b)(6) lies where the complaint reveals on its face that plaintiffs lack standing. *Sacks v. Office of*  
25

1 *Foreign Assets Control*, 366 F.3d 764, 771 (9th Cir. 2006); *DeSaracho v. Custom Food Machinery,*  
2 *Inc.*, 206 F.3d 874, 878 (9th Cir. 2000).

3 **1. Plaintiff Ramirez Has Standing to Sue for Bad Faith.**

4 Plaintiff Ramirez has standing to sue for bad faith due to his contractual relationship with  
5 Defendant California Casualty. As the parties in this case failed to provide the Court with a copy of  
6 their contractual agreement, the Court operates under the standards set forth in Nevada Revised  
7 Statute 485.3091(1)(b). In relevant part, the statute states that motor vehicle insurance policies cover  
8 “the person named therein and any other person, as insured, using any such motor vehicle with the  
9 express or implied permission of the named insured, against loss from the liability . . . for damages  
10 arising out of the ownership, maintenance or use.” Plaintiff Ramirez operated the vehicle with the  
11 express permission of the named insured and accordingly has a contractual relationship with  
12 California Casualty sufficient to support a claim for bad faith and breach of fiduciary duty. He brings  
13 this bad faith claim against Defendant because it did not protect him from the Estate’s claim against  
14 him for causing serious injury and death of Taputu.

15 Defendant argues the relevance and precedent of the Nevada Supreme Court’s holding in  
16 *United Fire Insurance Company v. McClellan*, 780 P.2d 193 (Nev. 1989). In that case, the Nevada  
17 Supreme Court denied a wife’s bad faith claims because it was not based on the insurance company’s  
18 denial of her own benefits, but on her husband’s who was in dispute with the insurance company  
19 about its responsibility for coverage of his health benefits. *Id.* That case has little bearing on the  
20 instant case and its holding was distinguished by the court in *Hatchwell v. Blue Shield of California*,  
21 198 Cal. App. 3d 1027, 244 Cal. Rptr. 249 (Cal. Ct. App. 1988). The court there distinguished  
22 between a non-contracting party’s bad faith claim when her benefits are in dispute and when such a  
23 party attempts to bring a bad faith claim on behalf of someone else’s benefits. *Id.* at 253. It held that  
24 a non-party has standing only when it is her own benefits that are in dispute. *Id.* Clearly this would  
25 be the case in the instant matter before the Court.

1 The most significant decision on point with its ruling is *Bergerud v. Progressive Casualty*  
2 *Insurance*. 453 F. Supp. 2d 1241 (D. Nev. 2006). In that case, the son of the insured was in a  
3 vehicular accident and filed a claim with the defendant insurance carrier. *Id.* The court discussed that  
4 “Nevada has not addressed whether a non-contracting party who falls within a policy’s definition of  
5 an “insured” and who claims benefits for himself under that policy has a contractual relationship with  
6 the insurer giving rise to the implied covenant of good faith and fair dealing.” *Id.* at 1246.  
7 According, the court held that the covenant of good faith and fair dealing should be extended to a  
8 non-named party who is defined by the policy as “insured.” *Id.* at 1249. This relationship rises to the  
9 level of contract and will support a claim for bad faith and breach of fiduciary duty. Also, due to the  
10 contractual relationship, plaintiff was considered to be a first-party claimant.

11 Given the absence of the parties’ contractual agreement in this case, and the precedent in the  
12 District of Nevada, this Court applies the *Bergerud* reasoning to the guidelines of the statute and finds  
13 that Plaintiff Ramirez qualifies as an “insured” permissive user and accordingly enjoys the rights of  
14 a contractual party with Defendant, which allows for a claim for bad faith in the instant case.  
15 Accordingly, the Defendant’s Motion to Dismiss is *denied* as to Plaintiff Ramirez.

## 16 **2. Plaintiff Estate Does Not Have Standing to Sue for Bad Faith.**

17 It is established in Nevada that an action for declaratory judgment against defendant’s  
18 insurance company regarding insurance coverage cannot be brought before obtaining a judgment  
19 against the defendant. *See Hunt v. State Farm Mutual Auto. Ins. Co.*, 655 F. Supp. 284 (D. Nev.  
20 1987); *Knittle v. Progressive Casualty Ins.*, 112 Nev. 8, 908 P.2d 724 (Nev. 1996). A judgment has  
21 been issued in this case. The question of Plaintiff Estate’s standing relies upon it having received  
22 standing in this matter, either by assignment or execution by an insured. It has failed to do so.

23 Plaintiff argues that the right to bring a suit upon judgment being entered against the tortfeasor  
24 can be read in between the lines of rulings indicating that a judgment must be entered prior to pursuing  
25 an action against defendant insurance company. (#11 at 7). However, a judgment does not confer

1 standing by itself. For Plaintiffs, it is the simple matter of timing of the suit—a third-party tort  
2 claimant must wait until after the judgment against the tortfeasor has been obtained, and then he or  
3 she has the proper standing to bring suit, without analysis of the requisite relationship between the  
4 parties. The Nevada Supreme Court held that a plaintiff’s right to bring a third-party tort claim against  
5 an insurance company was “contingent on her successful litigation of a pending tort suit.” *Knittle v.*  
6 *Progressive Casualty Ins. Co.*, 908 P.2d 724 (Nev. 1996). Plaintiffs point to this holding as a parallel  
7 to the Estate’s position in this case, that once the judgment was obtained against Ramirez, the Estate  
8 has proper standing.

9 Defendant correctly points out that without proper assignment of rights, Nevada does not  
10 recognize a right of action by a third-party claimant against an insurance company for bad faith. *See*  
11 *Hall v. Enterprise Leasing Co. W.*, 137 P.3d 1104 (Nev. 2006). Defendant also cites to *Tweet v.*  
12 *Webster* and *Hunt v. State Farm Insurance* to support its claim. In *Tweet v. Webster*, the District  
13 Court of Nevada held that third-party claimants do not have a remedy against insurers under tort  
14 theory for refusal to settle a reasonably clear claim. 610 F. Supp. 104 (D. Nev. 1985). Subsequently,  
15 in *Hunt v. State Farm Insurance*, the court stated that “Nevada does not recognize a right of action  
16 on the part of a third party claimant against an insurance company for bad faith refusal to settle.” 655  
17 F. Supp. 284 (D. Nev. 1987) (citing to *Tweet v. Webster*).

18 The court in *Hall v. Enterprise Leasing* evaluated whether “statutory liability coverage  
19 provided by the short-term lessor of a motor vehicle is implicated when a plaintiff accepts a formal  
20 offer of judgment in the amount of other primary liability coverage available to the short term lessee.”  
21 137 P.3d at 1105. The Nevada Supreme Court examined the applicability and interplay between  
22 N.R.C.P. 68 (offer of judgment) in the statutory requirements of N.R.S. 482.295 and 482.305. *Id.*  
23 The court held that a lessor’s obligation is conditioned solely upon the legal liability of the lessee to  
24 the injured party for damages. *Id.* In that case, plaintiff Hall was injured by the driver of a rental car.  
25 He brought suit against the driver, Ono, and the leasing company, Enterprise. Hall dismissed the

1 action against Enterprise at some point without prejudice and accepted an offer of judgement from  
2 Ono's personal insurance carrier. Later, he filed another suit against Enterprise to cover his remaining  
3 medical costs. The Supreme Court on appeal determined that Hall's acceptance of Ono's judgment  
4 "offer barred the second action because it extinguished Ono's legal liability to Hall, thus ending any  
5 obligation Enterprise had to pay Hall third-party benefits on Ono's behalf." *Id.* at 1106. The court  
6 held that the leasing company's obligation to pay was conditioned on the *legal liability* of the driver  
7 to a third party for damages. *Id.* at 1109.

8 Accordingly, Defendant's Motion to Dismiss is *granted without prejudice* as to Plaintiff  
9 Estate. Plaintiff Estate failed to make a showing that it received assignment or that it has been  
10 executed and obtained an insured's right. Plaintiff has sixty (60) days to provide evidence that it has  
11 received an assignment or the execution of an insured's right.

12 **C. Plaintiffs' Countermotion for Rule 11 Sanctions.**

13 Plaintiffs fail to satisfy the requirements for Rule 11 Sanctions in their Motion because they  
14 do not allege specific conduct for which Defendant should be held in violation of the Rule. Rule 11  
15 requires that a pleading or written motion not be presented for any "improper purpose" and that the  
16 "claims, defenses, and other legal contentions therein are warranted by existing law" and that  
17 "allegations and other factual contentions have evidentiary support or . . . are likely to have [it] after  
18 a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(1)(A). Plaintiffs  
19 allege that Defendant's Counsel refused to acknowledge that Ramirez is a named insured under  
20 N.R.S. 485.3091(2)(b) and that Counsel incorrectly relies on the caselaw he cites. These abbreviated  
21 allegations at the end of an 18-page complaint do not meet the Rule 11 requirements and according  
22 the Motion for Sanctions should be *denied*.

23 **CONCLUSION.**

24 IT IS HEREBY ORDERED that Plaintiffs' Motion for Remand should be *denied* (#6),  
25 Defendant's Motion to Dismiss should be *denied in part* as to Plaintiff Ramirez and *granted in part*



1 as to Plaintiff Estate (#9), and Plaintiffs' Countermotion for Rule 11 Sanctions should be *denied*  
2 (#11). Plaintiff Estate failed to make a showing that it received assignment or that it has been  
3 executed and obtained an insured's right. Plaintiff has sixty (60) days to provide evidence that it has  
4 received an assignment or the execution of an insured's right.

5 DATED: November 26, 2008

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8 ROBERT C. JONES  
9 UNITED STATES DISTRICT JUDGE  
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